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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

BOYCE MOTOR LINES, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AGAINST THE ABOVE-NAMED RESPONDENT.

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of Boyce Motor Lines, Inc. alleges and respectfully shows to this Honorable Court:

A Summary Statement of the Matter Involved.

This petition seeks to review a determination of the Court of Appeals for the Third Circuit which reversed an order of the United States District Court for the District of New Jersey.

The Grand Jury in and for the District of New Jersey returned an indictment of which Counts 1, 3, and 5 charged the defendant with violation of a certain regulation (49 C. F. R. 238, 1949 Ed. Section 197.1(b)) promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code. The District Court dismissed Counts 1, 3, and 5 on the ground that the Interstate Commerce Commission regulation, violation of which was the foundation of said counts, is invalid because the regulation fails to meet the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

The other three counts of the indictment were sustained by the District Court and no appeal was taken from such decision.

The Court of Appeals for the Third Circuit reversed the District Court and sustained Counts 1, 3, and 5 of the indictment.

The opinion of the District Court, reported in 90 F. Supp. 996, is printed at pp. 9a-17a of the Record. The opinion of the Court of Appeals, not yet reported, is printed at pp. 24-29 of the Record.

The question involved in this appeal is whether the following regulation promulgated by the Interstate Commerce Commission, (49 C. F. R. 238, 1949 Ed., Sec. 197.1 (b)) meets the constitutional requirement that a criminal regulation afford an ascertainable standard of guilt:

> "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practi-

cable and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The regulation was promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code which reads as follows:

"The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

. . . . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Count 1 of the indictment (R. pp. 2a-3a) charged the defendant with committing a crime in that it transported carbon bisulphide by truck from Cascade Mills, New York, through the State of New Jersey en route to Brooklyn, New York and that it caused its driver to drive the motor vehicle

containing the shipment into the Holland Tunnel at Jersey City, New Jersey; and that there were other available and more practical routes for the transportation of said shipment. Counts 3 and 5 of the indictment allege substantially the same offense with reference to different dates.

The District Court in its opinion (R. pp. 10a-11a) stated:

> "The defendant contends that the quoted regulation is invalid because of its failure to define an 'ascertainable standard of guilt.' We agree with this contention. The regulation clearly imposes upon the 'drivers of motor vehicles' the duty to avoid 'congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,' only 'SO FAR AS PRACTICABLE, and, WHERE FEASIBLE.' The duty is not absolute but is limited; it must be discharged only as far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another."

The District Court relied in this connection upon the rule laid down by this Court in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 and *Connally* v. *General Construction Co.*, 269 U. S. 385.

The Court of Appeals, in reversing, relied upon the decision in *Screws* v. *United States*, 325 U. S. 91, on the ground that this decision held that where "wrongful intent" is part of the offense charged, the regulation need not contain a clearly ascertainable standard of guilt. The Court

indicated (R. p. 28) that it will be a question for the jury to determine which of two or more routes involves the "fewest congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings"; and said "the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

The Basis Upon Which This Court Has Jurisdiction to Review the Judgment in Question.

(a) The jurisdiction of this Court to review the judgment in question is based on Act of June 25, 1948, ch. 646, 62 Stat. 928 (Tit. 28 U. S. Code, 1948 ed., Section 1254 (1)).

(b) This appeal involves the validity of a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 ed., Section 197.1(b), as promulgated pursuant to Section 835 of Title 18, U. S. Code, the pertinent provision of both of which are set forth in full above.

(c) The date of the judgment of the Court of Appeals sought to be reviewed is May 3, 1951. By order of this Court dated May 25, 1951 (R. p. 32), the time for filing this petition was extended to and including July 2, 1951. The date of the filing of this petition is July 2, 1951.

The Question Presented.

Whether the regulation (49 C. F. R. 238, 1949 ed., Sec. 197.1(b)) requiring drivers of motor vehicles transporting explosives and other dangerous articles to avoid so far as

practicable and, where feasible, by the pre-arrangement of routes, congested thoroughfares, tunnels, etc., prescribes an ascertainable standard of guilt adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them as required by the Fifth and Sixth Amendments to the Constitution.

Reasons Relied On for the Allowance of the Writ.

1. The determination of this question presents a matter of vital importance to the entire trucking industry of the United States and involves a matter of public interest.

The transportation of explosive and inflammable liquids by truck is perfectly legal and, in fact, is essential not only to our economy generally, but particularly at this time in connection with our national defense effort.

The Interstate Commerce Commission has promulgated clear rules as to the packaging of such dangerous articles and the marking of the vehicles used to transport them. Such regulations must certainly be complied with and are not here in question.

When we come to the regulation which is involved in this application, however, an entirely different question is presented. The facts of the present case as set forth in the indictment graphically present the problem:

Here the defendant is charged with a crime in that in the course of transporting certain articles to Brooklyn, New York, defendant's truck entered the Holland Tunnel, a vehicular crossing under the Hudson River, alleged in the indictment to be "a congested thoroughfare", when

"there were other available and more practicable routes for the transportation of said shipment." (R. pp. 2a-3a).

Judicial notice must be taken of the fact that it is physically impossible for a truck to enter Brooklyn, New York, without "driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts * * *" (49 C. F. R. 238, 1949 Ed. Sec. 197.1 (b)).

The prohibition in the regulation is not against entering or driving into such places. It is against entering or driving into them only when it is "practicable" or "feasible" to avoid such places.

Who is to determine which of several routes is more practicable or feasible than another? Is the George Washington Bridge across the Hudson with its viaduct approaches more feasible than a tunnel without viaduct approaches? Shall a truck go along street car tracks and avoid a tunnel, or go through a tunnel and avoid street car tracks? Nowhere in New York City, en route to Brooklyn could a truck go without driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings."

The prohibition in the regulation is not absolute but is limited. It requires the avoidance of such places only as far as "practicable" and where "feasible." No standard is set up to establish what may be considered as more "practicable" or more "feasible." The Court of Appeals recognized that a choice between two evils would have to be made by the trucking company when it said (R. p. 28):

> "In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

If this regulation is allowed to stand in its present form, no trucking company can, without subjecting itself to criminal penalties, enter any urban community, since no standard is set up to guide a jury in determining what is meant by "practicable" and "feasible" in the regulation.

2. The Court of Appeals has given to the decision in *Screws* v. *United States*, 325 U. S. 91 an application which is contrary to the decisions in *Connally* v. *General Construction Company*, 269 U. S. 385 and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.

In *Connally* v. *General Construction Company, supra*, this Court struck down as void for uncertainty an Oklahoma statute which imposed criminal penalties upon contractors dealing with the state who paid to their workmen less than the "current rate of per diem wages in the locality where the work is performed." The Court said at page 395:

> "The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal."

In *United States* v. *Cohen Grocery Co., supra*, this Court struck down a Federal statute which imposed criminal pen-

alties on the making to any person of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

The decisions of this Court have always construed the Fifth and Sixth Amendments to the Constitution as requiring that a statute set forth an ascertainable standard of guilt so that a citizen can determine from the language of the statute or regulation whether his course of conduct is one which will involve him in criminal penalties. As this Court pointed up in *Connally* v. *General Construction Company, supra:*

> "'* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another * * *'" (p. 393).

To leave to the determination of a jury the question as to whether a particular route is more "practicable" or more "feasible" than another route is to deprive a citizen of his right to determine from the statute or regulation what the standard of guilt will be and to leave this standard up to the whim or caprice of a jury.

The decision of the Court of Appeals in reversing the District Court and upholding the indictment gives an interpretation to the decision in *Screws* v. *United States, supra*, which would put that decision directly in contradiction to *Connally* v. *General Construction Company, supra*, and *United States* v. *Cohen Grocery Co., supra*. In the *Screws* case the question was whether Section 20 of the Criminal Code violates the due process clause of the Fourteenth Amendment. That section made it a criminal offense willfully to deprive any person of "any rights, privileges, or immunities, secured or protected by the constitution and laws of the United States." This Court upheld this provision of the statute but held that a conviction thereunder could be had only if, as part of the offense, a jury should find that the act was done with the specific intent to deprive a person of a right granted to him by the Constitution or laws of the United States.

The Court of Appeals in the instant case has distorted the decision in the *Screws* case by stating that this decision is applicable since the instant statute requires "actual knowledge of the existence of a duty under the regulation and a wrongful intent to evade it." In view of the manner in which the *Screws* case was admittedly decided as evidenced by the statement of Mr. Justice Rutledge in his opinion (325 U. S. at p. 134), any extension of the principle thus engendered would appear unwarranted. Naturally, trucking companies are charged with a knowledge of the regulations. But what is meant by the phrase "a wrongful intent to evade it"? The problem here is that the trucking company may choose a route which may be "practicable" or "feasible" even though it may pass through crowded

thoroughfares, tunnels, and viaducts—but there is no standard laid down in the regulation to define what is meant by "practicable" or "feasible". The Court of Appeals admits that "individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternative route may differ from the view of the jury which tries him." (R. p. 27). This observation brings the regulation clearly and squarely within the condemnation of this court in the *Connally* case. But "practicable" and "feasible" are not words of commonly accepted meaning such as a "reasonable standard of care" in negligence cases. They are words which impose upon the defendant the duty of making a choice at his risk with no ascertainable standard for determining which of the choices considered may be innocent and which may involve criminality.

This situation is entirely different from that in the *Screws* case wherein this Court properly pointed out that a defendant could be convicted under Section 20 of the Criminal Code where he willfully intended to deprive a person of a right guaranteed him under the laws or Constitution of the United States. The existence of those laws, the knowledge of the defendant thereof and the intent to deprive the other person of his right under those laws were all matters of definite ascertainment. There was no question of alternative choices as there was in the *Connally* case, the *Cohen Grocery Co.* case and as there is in the instant case.

The decision of the Court of Appeals in this case, if allowed to stand, puts upon the *Screws* case a significance

which does not appear from the decision in that case. Such significance would furnish a precedent for the sustaining of vague and indefinite regulations of administrative bodies under circumstances requiring a choice to be made by a defendant at the risk that some jury may later disagree with his choice and impose criminal penalties upon him for having guessed wrong.

Professor Julius Cohen in his article on "The Screws Case" in the Columbia Law Review, 46 Col. L. Rev. 94, pointed out this distinction in the following language:

> "Whatever may be the difficulties in demarcating—to the satisfaction of the criminal law standard of certainty—all of the constitutional rights to which a person may be entitled under the Fourteenth Amendment; there can be no doubt but that the right not to be deprived of *life* without 'due process' is, to enforcement officers at the very least, a known constitutional right. It is not a case, as in *United States* v. *Cohen. Grocery Co.*, in which the statute left open 'the widest conceivable inquiry, the scope of which no one can foresee * * * or adequately guard against,' or where 'to attempt to enforce the * * * [law] would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury'." (at p. 104).

The Court of Appeals has interpreted the *Screws* case to mean that a statutory requirement of "intent" is a sufficient substitute for a clearly defined standard of right or wrong. There is no basis for such conclusion. Since intent merely describes the state of mind which is required to accompany a proscribed act, a statute must be certain or

uncertain, not in terms of the intent required, but in terms of the act itself.

The Court of Appeals also relied on *Sproles* v. *Binford*, 286 U. S. 374 which is patently distinguishable from the instant case since the text of the statute involved in that case, by referring to the "nearest" carrier and by prescribing that the "shortest" route be taken, affords a definite standard of conduct which is wholly lacking in the regulation under consideration.

For the foregoing reasons, it is repectfully requested that the Court grant this petition for review of the judgment of the Court of Appeals for the Third Circuit as aforesaid.

Respectfully submitted,

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